

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-10834</u>
WILLIE E. HATCHER)	
P. O. Box 4545)	FILED
Martinez, Georgia 30907)	at 2 O'clock & 36 min. A.M.
SS# 260-44-7872)	Date: 3-14-90
)	
Debtor)	

ORDER

This Chapter 13 proceeding came before the court for confirmation. Debtor, Willie E. Hatcher, proposes a composition Chapter 13 plan paying Three Hundred Forty and No/100 (\$340.00) Dollars per month to the Chapter 13 trustee over a period of sixty (60) months to pay all allowed secured claims in full with the balance of payments distributed to unsecured creditors pro rata based upon the amount of their allowed claims. At the initial confirmation hearing which the debtor failed to attend, the trustee announced that the debtor was current in his payments, but based upon the claims filed the debtor required an increase in payments to Four Hundred Thirty-One and No/100 (\$431.00) Dollars per month for a period of sixty (60) months to pay secured claims with no dividend to the holders of unsecured claims. Debtor's counsel requested and obtained a continuance. Prior to the

continued

confirmation hearing, the debtor objected to the unsecured claim of Mary Walker, T/A Meadow Brook Kennels and to that portion of the claim of First Union Mortgage Corporation ("First Union") for appraisal and attorney fees totaling Two Thousand Six Hundred Nineteen and No/100 (\$2,619.00) Dollars. The debtor did not object to the balance of the claim of First Union in the principal balance of Forty-Six Thousand Seven Hundred Sixty-One and 84/100 (\$46,761.84) Dollars secured by a first mortgage interest in real property and a prepetition payment arrearage claim totaling Twenty Thousand Nine Hundred Eighty-Two and 57/100 (\$20,982.57) Dollars, representing thirty seven (37) prepetition monthly payments for the period June, 1986 through June, 1989. First Union has objected to confirmation contending that this Chapter 13 proceeding represents an abuse of the bankruptcy process and a bad faith filing.

Inquiry by this court regarding the confirmation requirements of 11 U.S.C. §1325(a) reveal the following: This is not the debtor's first bankruptcy proceeding. It is in fact the fifth Chapter 13 proceeding brought by this debtor since 1980. The debtor's first Chapter 13 proceeding was filed February 4, 1980. In re: Willie Emanuel Hatcher and Shirley Elizabeth Hatcher, Chapter 13 Case No. 180-00045. In the initial

proceeding, the debtor listed no secured debts and proposed a plan to pay a one percent (1%) dividend to unsecured creditors whose claims are duly proven and allowed which plan was confirmed by order dated June 26,

1980. The debtor received a discharge on October 22, 1982. On July 15, 1986, the debtor filed his second Chapter 13 proceeding, In re: Willie E. Hatcher, Chapter 13 Case No. 186-00657. The plan of the debtor in the second case proposed to pay all claims in full including arrearages owed to the predecessor in interest of First Union on prepetition arrearages with postpetition payments to First Union's predecessor in interest paid direct commencing with the installment due for August 1, 1986. The plan was confirmed December 9, 1986, and voluntarily dismissed on January 20, 1987. The third Chapter 13 proceeding brought by the debtor, In re: Willie E. Hatcher Chapter 13 Case No. 187-00069, was filed January 26, 1987, and set forth a plan identical to the previously confirmed Chapter 13 plan in case No. 186-00657 with the exception that current payments due the predecessor in interest of First Union were to commence with installment due February 1, 1987. This case was confirmed on June 16, 1987. By motion filed February 2, 1988, First Union sought relief from stay in order to foreclose based upon the failure of the debtor to meet postpetition payments under the terms of the plan. The motion was

settled by consent order entered March 10, 1988. The consent order required the debtor, beginning March 1, 1988, to meet timely monthly payments to First Union and to cure a postpetition arrearage of Eight Thousand One Hundred Sixteen and 26/100 (\$8,116.26) Dollars at the rate of Five Hundred Eighty-One and 33/100 (\$581.33) Dollars per month beginning March 1, 1988. First Union renewed its motion for relief from stay on May 13, 1988. Based upon the failure of the debtor to meet the payment, obligations under the consent order, relief from stay was granted May 16, 1988. The debtor received a discharge on August 29, 1988. Debtor's fourth Chapter 13 proceeding, In re: Willie E. Hatcher, Chapter 13 Case No. 88-11082, was filed September 2, 1988, and proposed a plan to pay Two Hundred Seventy-Five and No/100 (\$275.00) Dollars per month to the Chapter 13 trustee for a period of sixty (60) months to pay a composition dividend to the holders of unsecured claims. The plan also provided to pay prepetition arrearages due First Union by distributions from the Chapter 13 trustee with the debtor to make direct payments to First Union commencing with the regular payment due for October, 1988. By motion filed November 17, 1988, First Union again sought relief from stay. By order entered January 23, 1989, relief from stay was denied on condition that debtor cure his postpetition arrearages at the rate of one additional payment per month. The debtor failed to attend the continued confirmation hearing and by

order dated March 21, 1989, that case was dismissed.¹

The current and fifth Chapter 13 proceeding was filed June 6, 1989.

The current Chapter 13 case provides for the payment of prepetition arrearages due First Union through distributions made by the Chapter 13 trustee with current payments, postpetition, to be made directly by the debtor beginning with payment due July, 1989. At the confirmation hearing, the debtor testified under oath that he had made either three or four postpetition payments. Since filing through date of hearing six postpetition payments have come due. The debtor testified that he now works in Atlanta, Georgia and returns to the premises covered under First Union's security interest on the weekends. The debtor maintains that the premises in question is his homeplace, but he contradicted himself in testimony as to the number and identity of persons that resided in the household.

Regarding the claim of Mary Walker, T/A Meadow Brook Kennels, Ms. Walker obtained a judgment against the debtor in the Civil Court of Richmond County, Georgia on June 9, 1980 in the

¹The court may take judicial notice of prior bankruptcy petitions filed by a debtor when considering a subsequent petition. See, In re: Jackson 49 B.R. 298 (Bankr. Kans. 1985). See, also Allen v. Newsome 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition.)

original principal sum of One Thousand Five Hundred Twenty-Eight and No/100 (\$1,528.00) Dollars plus future interest at a rate of Seven Percent (7%) per annum plus costs of Twenty-Four and 25/100 (\$24.25) Dollars. The judgment was renewed in the sum of Two Thousand Three Hundred Sixty-Five and 85/100 (\$2,365.85) Dollars with future interest at a rate of Twelve Percent (12%) per annum and costs in the amount of Fifty-Six and 50/100 (\$56.50) Dollars on April 11, ~ 1988. The first reference by the debtor of this debt due Ms. Walker

occurred in his fourth Chapter 13 proceeding brought in 1988. At the hearing on the debtor's objection to the claim of Ms. Walker held immediately prior to the hearing on confirmation, the objection was overruled and the claim was allowed as an unsecured claim in the amount of Two Thousand Seven Hundred Forty-Nine and 59/100 (\$2,749.59) Dollars.

The issue presented is whether this filing meets the good faith criteria for confirmation under 11 U.S.C. §1325(a)(3). This court is charged with the duty of making a case by case inquiry to determine whether the proposed Chapter 13 plan meets the statutory criteria of good faith. In re: Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986); In re: Steele, 34 B.R. 172 (Bankr. M.D. Ala. 1983). Although a comprehensive definition of good faith is not practical, broadly speaking, the basic inquiry should be whether

under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of Chapter 13 in the proposed plan.

Kitchens v. Georgia Railroad Bank & Trust Co. 702 F.2d 885 (11th Cir. 1983). The Kitchens decision sets forth basically thirteen factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorneys fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;

8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, 'in dealing with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayments; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Company, supra at 888.

The application of the following Kitchens criteria to the facts of this case are critical in determining that the proposed plan fails to meet the confirmation criteria of good faith.

The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; the debtor's degree of effort; the frequency with which the debtor has sought relief under the

Bankruptcy Reform Act and its successors; and the circumstances under which the debtor has contracted his debts and his demonstrated bona fides. or lack of same in dealing with his creditors collectively require a determination that the debtor has not demonstrated a commitment to the spirit and purpose of Chapter 13. Chapter 13 affords the debtor the opportunity to set forth a plan to repay his debts to the extent possible in an orderly fashion from distributions from his future income while retaining his assets and maintaining a reasonable standard of living. See, In re: Higginbotham, Chapter 13 Case No. 88-60192 (Bankr. S.D.Ga. 1989).

This is the fifth Chapter 13 proceeding brought by this debtor within a ten-year period. Debtor is correct in his contention that successive filings do not by themselves, constitute bad faith under 11 U.S.C. §1325(a)(3), but successive filings are one of the factors to be considered in a good faith determination. From the unobjected to portion of the claim of First Union, the last payment made to First Union on the mortgage interest held by it was for the June, 1986 payment, the month prior to the filing of the second Chapter 13 proceeding. The debtor has not met the postpetition payment obligations due First Union in any of the last four Chapter 13 proceedings and the repeated filings represent nothing more than an attempt to continually thwart the efforts of First Union to collect,

either through -regular payment or foreclosure, the debt due. The purpose of these multiple filings is not to effectuate a plan of repayment, but to avoid repayment.

The debtor failed to list the obligation due Ms. Walker in his first three filings. Additionally, the debtor is now employed in Atlanta, Georgia and in spite of his testimony that the property securing the loan held by First Union is his homeplace, the debtor had difficulty in identifying the persons residing in the premises. This court finds the debtor's testimony evasive, contradictory, and totally lacking credibility. A determination of the debtor's sincerity in seeking relief under Chapter 13 at least requires a determination that the debtor was truthful in his testimony before the court. This court cannot make that determination. The Court of Appeals for the Eleventh Circuit articulated the responsibility of this court in conducting a confirmation hearing when it stated:

We hold that with 1325(a)(3) Congress intended to provide bankruptcy courts with discretionary means to preserve the bankruptcy, process for its intended purpose. Accordingly, whenever a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith, as we do here, confirmation must be denied.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the

bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.

The cornerstone of the bankruptcy courts has always been the doing of equity. The protection and forgiveness inherent in the bankruptcy laws surely requires conduct consistent with the concepts of basic honesty. Good faith or basic honesty is the very antithesis of attempting to circumvent a legal obligation through a technicality of the law.

In re: Waldron, 785 F.2d 936, 941 (11th Cir. 1986). See also Flygare v. Boulden, 709 F.2d 1344, 1347, (10th Cir. 1983); U.S. v. Estus, 695 F.2d 311, 316-17 (8th Cir. 1982); In re: Rimgale, 669 F.2d 426, 431-32 (7th Cir. 1982).

In addition to denial of confirmation, this court may issue any order that is necessary or appropriate to prevent an abuse of

process See, 11 U.S.C. §105(a).

It is therefore ORDERED that confirmation of the debtor's plan is denied, and this Chapter 13 case is dismissed. Further ORDERED that in any subsequent Chapter 13 proceeding brought by this debtor, the stay imposed under the provisions of 11 U.S.C. §362(a) is modified to the extent necessary to allow First Union to proceed without further order with foreclosure of its security interest in its collateral pursuant to applicable state law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 14th day of March, 1990.